The Comptroller General
of the United States

Washington, D.C. 20548

McAuliffe

Decision

Matter of: American Seating Company

File: B-230171.36

Date: August 31, 1989

DIGEST

1. Contracting officer reasonably denied protester an exemption from requirement for certified cost or pricing data where agency audits showed that its offered prices were not based on established catalog or market prices of commercial items sold in substantial quantities to the general public.

2. Protest that agency improperly disallowed dealer commission costs of 10 percent of selling price during cost analysis performed to determine reasonable prices for multiple-award contract is denied where record shows that any dealer commissions were paid at between zero and 10 percent of the selling price with no apparent consistency or regularity of application, and firm provided insufficient data to support allowance of such costs.

3. Where agency reasonably determines that the protester's prices for multiple-award contract were too high based on a cost analysis (following detailed audits), additional price analysis is not required before rejecting the offer since applicable regulation generally contemplates a price analysis only to ensure that previously agreed-upon prices following a cost analysis are fair and reasonable.

4. Protest alleging improper auction techniques is denied where record indicates that agency disclosed price objective during negotiations and did not present a price (on a "take-it-or-leave-it" basis) that protester had to meet in order to obtain further consideration.

DECISION

American Seating Company protests the rejection of its offer submitted in response to request for proposals (RFP) No. FCNO-87-B701-B-1-26-88, issued by the General Services Administration (GSA) for multiple-award Federal Supply Schedule (FSS) contracts to supply office furniture systems

for the period from October 1, 1988 through September 20, 1991. American Seating's offer was rejected because GSA determined that American Seating failed to establish the reasonableness of its offered prices.

We deny the protest.

The RFP, issued on December 10, 1987, provided that multiple awards would be made to those offerors whose offers, conforming to the solicitation, were most advantageous to the government. The RFP generally provided that prices for items to be awarded under the solicitation would be negotiated on the basis of discounts from each offeror's established catalog or market prices. These offerors were required to certify, in accordance with Federal Acquisition Regulation (FAR) § 15.804-3(c), that their prices were based on established catalog or market prices of commercial items and that substantial quantities of the items had been sold to the general public at those prices. The solicitation further notified all offerors that if the government determined that an offeror's prices were not based on established catalog or market prices of commercial items sold in substantial quantities to the general public, the agency would require the submission of cost or pricing data (certified as accurate, complete, and current) in support of the proposed prices.

American Seating submitted a timely proposal by the extended deadline of May 20, 1988.1/ American Seating's proposal included discount and sales information on a form supplied with the RFP (Discount Schedule and Marketing Data (DSMD) form). To determine the reasonableness of American Seating's prices for negotiation purposes, GSA auditors reviewed the DSMD provided by the protester, which was found to be inaccurate and incomplete. American Seating was given the opportunity to correct these deficiencies and, in fact, revised its DSMD five times. American Seating also submitted pricing and catalog number corrections. Since the first audit did not demonstrate to GSA's satisfaction that American Seating's prices met the RFP's "commerciality" requirements (i.e., prices based upon substantial sales of

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1/ GSA subsequently found the protester nonresponsible and rejected its proposal after a financial preaward survey indicated a large amount of debt and a lack of verifiable credit for American Seating. Thereafter, as a result of an earlier protest to our Office, GSA reexamined the protester's financial condition and accepted its proposal for purposes of discussions for award, even though the agency still considered the firm's finances marginal.

items to the general public based on established catalog or market prices), GSA conducted a second audit. The agency reports that the results of this audit (performed during October and November) still did not satisfy the commerciality standards for exemption from the required submission of certified cost or pricing data. GSA, on November 16, advised American Seating to submit cost or pricing data for 25 large quantity items. GSA explains that it intended to use this data to formulate a standard costing methodology to determine the appropriate costs of the remaining approximate 1700 items. GSA then audited the cost or pricing data for the 25 items (later including 10 additional items); the audit found that a costing formula for the remaining items could not be devised, but that a basis for price negotiations for the 35 audited items existed.

On February 17, 1989, American Seating and GSA nevertheless agreed to attempt to determine an acceptable cost allocation formula for the remaining non-audited items, and that if an acceptable formula could not be reached, American Seating would be required to submit cost or pricing data for the balance of the items. No costing formula agreement was reached despite continued correspondence on the matter in February and early March. On March 14, the first day of formal negotiations, American Seating proposed a costing formula which the parties discussed in terms of allowable costs. Among the items discussed was the allowability of a proposed 10 percent charge by American Seating for dealer commissions (which was unacceptable to GSA) as well as the proper allocation of profit. The record indicates that during negotiations American Seating continued to insist that GSA also determine the reasonableness of its prices based upon offered discounts from certain list prices (as opposed to prices based on allowable costs). GSA declined to do so.

On March 15, after reviewing the events of the prior day's negotiations, GSA initiated the second day's negotiation session by presenting a pricing objective as a basis for continued price negotiation. After confirming that the protester did not have any additional questions, GSA requested that American Seating submit its "Best and Final Offer" (BAFO) at its convenience. Later that afternoon, after a break in the negotiations, American Seating submitted its BAFO, and requested that GSA immediately review the offer and sign the appropriate line marked on the BAFO indicating the agency's acceptance or rejection of the offer. Finding that the protester's BAFO would not result in fair and reasonable prices, the contracting officer rejected the offer. Written notification of the rejection

of its offer was sent to American Seating on March 16, 1989. This protest followed.

American Seating initially contends that GSA improperly determined that items it offered do not qualify for an exemption from the requirement to submit certified cost or pricing data. In this regard, the protester specifically contends that GSA misevaluated American Seating's sales to its dealers pursuant to certain buying agreements to be sales to nongovernment customers at other than catalog prices.

In response, GSA reports that it did examine the special buying agreements mentioned by the protester, but that American Seating did not provide any persuasive support to indicate that the sales were misclassified. GSA also states that its preaward audits revealed that the discounts granted through these special buying agreements were often in excess of those revealed in the DSMD provided by the protester and thus its DSMD was inaccurate.

Under FAR § 15.804-3(a)(2) (FAC 84-35), certified cost or pricing data is not required when a contracting officer determines that prices are based on established catalog or market prices of commercial items sold in substantial quantities to the general public. The record shows that detailed GSA audits revealed that proposed prices by American Seating for numerous products were not based on established catalog or market prices of commercial items sold in substantial quantities to the general public. Specifically, GSA auditors found that numerous products did not meet the test because more than 65 percent of the total units sold for each product grouping were sold to the government (the commerciality of other products was questionable since government sales represented between 45 and 65 percent of the total units sold).2/ There is no credible evidence in the record to rebut the findings of the GSA auditors or the agency's determination based on these findings. The record also shows that the DSMD form submitted by American Seating (and revised by the firm several times) was inaccurate because, under American Seating's special buying agreements, discounts offered were greater than those revealed in the DSMD form. This is an additional reason, in our view, for the agency to request cost or pricing data. In light of the questionable accuracy of the pricing documents submitted by American Seating, as

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2/ In arriving at these findings, GSA auditors considered sales under American Seating's special buying agreements as sales to the general public.

well as the GSA auditors' documented findings that numerous items offered did not meet the test of commerciality, we find no reason to question the agency's request for certified cost or pricing data from the protester.

The protester next challenges the accuracy of GSA's cost analysis and contends that GSA not only improperly disallowed certain of its proposed costs, but that GSA improperly refused to credit the protester with an appropriate adjustment for profit. American Seating specifically protests the agency's disallowance of the dealer commissions it claimed.3/ Our review of the cost analysis does not support the protester's contention.

The record indicates that although American Seating's original offer and its DSMD specifically stated that no commissions were given to dealers or retailers, the protester subsequently claimed it was entitled to a 10 percent allowance for dealer commissions as a reasonable and necessary cost of doing business. During the formal negotiation session, American Seating apparently explained that although its payment of such commissions may have been erratic in the past, the firm's current policy is to apply a 10 percent dealer commission to all sales and that GSA should allow payment of that cost. In this regard, American Seating explained to GSA auditors that its dealers perform design, layout and installation services. However, GSA questioned the allowance of a dealer commission payment for these services since the solicitation separately listed these services as distinct line items payable on an hourly basis. Given the agency's concern about possible double payment for these services, GSA repeatedly requested that American Seating submit documented proof of its 10 percent dealer commission practice. In particular, American Seating was requested to provide copies of its dealer agreements which evidence its obligation to pay the commissions.

To date, the protester has not submitted copies of any such dealer agreements. Instead, American Seating submitted past sales records which it contends support its claim that a 10 percent allowable dealer commission is applicable.

3/ In its protest letter, American Seating also alleged that GSA improperly disallowed costs relating to manufacturing overhead, standard cost variances, freight costs, and selling, general and administrative overhead expenses. Since the protester failed to respond to the agency's rebuttal to these specific cost contentions, they are deemed abandoned. See The Big Picture Co., Inc., B-220859.2, Mar. 4, 1986, 86-1 CPD ¶ 218.

However, GSA states, and the record shows, that these figures indicate many dealer commissions between zero and 10 percent of the selling price with no apparent consistency or regularity of application. Without more substantial proof that such commissions are in fact an allowable expense, (e.g., through the submission of the dealer contract documents requested by GSA), we cannot find that the agency acted unreasonably in concluding that American Seating failed to meet its burden of showing that payment of that cost is reasonable as a necessary cost of doing business.4/

American Seating also contends that GSA improperly failed to credit American Seating with an appropriate adjustment for profit. The protester originally proposed a profit fee percentage of 29 percent, but later revised that factor during discussions to 14 percent. Using an objective methodology, GSA auditors calculated a profit fee of 9 percent as reasonable.

We think the record reasonably shows that in view of the other serious deficiencies in American Seating's BAFO, GSA would have rejected the firm's offer even if American Seating had offered a 9 percent profit margin. Since allegedly excessive profit, by itself, did not deprive the firm of an award to which it was otherwise entitled, we see no reason to consider this matter further. Cf. Employment Perspective, B-218338, June 24, 1985, 85-1 CPD ¶ 715; Lingtec, Inc., B-208777, Aug. 30, 1983, 83-2 CPD ¶ 279. In any event, we also note that other than merely expressing its dissatisfaction with the agency's profit determination, the protester has not given us any persuasive reason to question the propriety of the agency's determination of the profit percentage it considered reasonable.

American Seating also argues that GSA improperly refused to perform a price analysis of its offer after the parties were unable to agree on reasonable prices following cost evaluation. American Seating essentially contends that its prices are in line with other offerors and that a comparison with other proposed prices and prior contract prices would have revealed the reasonableness of its prices (American Seating

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4/ American Seating also argues that GSA should not have disallowed all of its dealer commissions as unreasonable since GSA found some of these commissions to its sales representatives to be reasonable. We merely note that the issue in this case is the propriety of the rejection of American Seating's BAFO which included the high dealer commission charges.

submitted comprehensive pricing information to GSA for this purpose). American Seating relies upon FAR § 15.805-1(b) (FAC 84-35) which provides:

> "When cost or pricing data are required, the contracting officer shall make a cost analysis to evaluate the reasonableness of individual cost elements. In addition, the contracting officer should make a price analysis to ensure that the overall price offered is fair and reasonable."

We are not persuaded by American Seating's arguments. We have found that GSA properly requested cost or pricing data from the protester and properly made a detailed cost evaluation of that data. We note that solicitations for multiple-award schedule contracts do not require offers for identical products on a common basis so that a comparison of prices of schedule contractors, while potentially helpful, does not necessarily establish the reasonableness of a firm's offered prices. Here, since GSA reasonably determined that the protester's prices were unreasonably high based on the cost analysis (following detailed audits), we do not think that a multiple-award price comparison would have resolved the problem. In any event, the cited regulation is phrased in the permissive ("contracting officer should make a price analysis,") and, in our view, generally contemplates a price analysis to ensure that previously agreed-upon prices following a cost analysis are fair and reasonable. Accordingly, we deny this protest ground.

The protester next alleges that the agency's discussions with American Seating were inadequate because GSA requested its BAFO before discussions were complete. We simply cannot agree. There is nothing in the record to indicate that discussions were other than meaningful, adequate and in accordance with the requirements of FAR § 15.610(c) (FAC 84-16). The protester was advised during the course of the procurement of the deficiencies in its proposal and in its cost and price submissions. Further, American Seating was afforded repeated opportunities to revise its proposal submissions to satisfy the government's requirements, and in fact, did submit several substantive cost and price revisions before voluntarily submitting its BAFO. This is the essence of negotiations.

Finally, American Seating contends that GSA engaged in improper auction techniques during negotiations by presenting a price that the protester had to meet in order to obtain further consideration. We cannot find that the record in any way supports American Seating's allegation that GSA, at the March 15 negotiation session, presented the

firm with a "take-it-or-leave-it" price; rather the record shows that GSA presented the firm with a price objective for further negotiation. In this regard, we note that it is not improper for a contracting agency to disclose a price objective as a negotiation tool for reaching an agreement as to a fair and reasonable price. See Professional Review of Florida, Inc.; Florida Peer Review Organization, Inc., B-215303.3; B-215303.4, Apr. 5, 1985, 85-1 CPD ¶ 394. In any event, American Seating was not in price competition with any offeror under this multiple-award solicitation; thus, an auction situation, strictly speaking, could not have occurred.

The protest is denied.

James F. Hinchman
General Counsel